No. 15084

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E. F. SHUCK CONSTRUCTION CO., INC.; THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC.; THE SEATTLE CONSTRUCTION COUNCIL; AND HOD CARRIERS, BUILDING AND COMMON LABORERS UNION, LOCAL NO. 242, AFL, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*),[1] for enforcement of its order (R. 54-65),[2] issued on October

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[1] The pertinent provisions of the Act are set forth in the Appendix, pp. 24-29.

[2] References to the printed record are designated "R." Whenever in a series of references a semicolon appears, the references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

28, 1955, against respondents E. F. Schuck Construction Co., Inc. (herein called the Company), The Associated General Contractors of America, Seattle Chapter, Inc. (herein called the AGC), The Seattle Construction Council (herein called the Council), and Hod Carriers, Building and Common Laborers Union, Local No. 242, AFL (herein called the Union). The Board's Decision and Order are reported at 114 NLRB No. 116. This Court has jurisdiction of the proceeding under Section 10 (e) of the Act, the unfair labor practices having occurred at Seattle and Mercer Island, Washington, within this judicial circuit.

STATEMENT OF THE CASE

I. The Board's Findings of Fact and Conclusions of Law

Briefly stated, the Board found that the Company and the Union were operating under a contract negotiated in the Company's behalf by AGC and its constituent body, the Council. The contract contained a union-security provision which gave an illegal preference to union members in respect to hire and retention of employment. The Board concluded that the Company violated Section 8 (a) (1) and (3) of the Act by giving effect to this illegal provision and by discharging employee Richard B. Kieburtz pursuant thereto, and that the Union violated Section 8 (b) (1) (A) and (2) of the Act by likewise giving effect to that provision and thereby causing the Company to discharge Kieburtz. Finally, the Board concluded that inasmuch as AGC and the Council maintained in effect the illegal provision which they had negotiated in behalf of the Company and their other employer-members and inasmuch as the discharge of Kieburtz stemmed from this

provision, AGC and the Council violated Section 8 (a) (1) and (3) of the Act.

A. The identity and business of AGC, the Council, and the Company

AGC is an incorporated association whose membership consists of employers in the Seattle area engaged in the construction of buildings and highways (R. 13, 47; 2, 7, 8, 10, 229, 240). The Council is a division of the AGC, its members being engaged in specialty contracting as distinguished from general contracting (R. 13, 47; 81, 83, 217-220). The AGC and the Council negotiate collective bargaining agreements with trade unions for their members and the members are bound thereby (R. 13, 47; 3, 7, 10, 83-85, 89-90, 108-109, 205-206).

The construction work performed by AGC members is in excess of $100,000,000 a year, at least 10 percent of which represents work performed outside the State of Washington (R. 47, 56; 220-226). Moreover, during 1953, various members of the AGC engaged in construction work directly involved in the national defense effort, including projects under direct contracts with the United States Government, e.g., construction of a powder magazine for the Navy in the sum of $1,397,000; a boat storage plant for the Navy in the sum of $1,321,000; and transmitter facilities for the Atomic Energy Commission in the sum of $437,000 and $1,278,000, respectively (R. 48, 56; 224, 226-229).

The Company, a Washington corporation, engages in construction work and has its principal offices in Seattle. A substantial portion of its work is under direct contract with departments or agencies of the United States Government or for employers engaged in inter-

state commerce (R. 13; 2-3, 8, 107-108, 232-239). At all times here relevant, the Company has been represented for collective bargaining purposes by AGC and the Council (R. 48-50, 58, n. 2; 108-109, 230-231, 241-243, 246-248.) [3]

Upon these facts the Board found that assertion of jurisdiction over the several respondents was proper (R. 13, 47-50, 55-57, 58, n. 2).

B. The unfair labor practices

1. *The illegal union-security provision*

On November 3, 1950, the AGC and the Council, in behalf of their members including the Company, entered into a collective bargaining agreement with the Union, and other building trade unions in the Seattle area (R. 13-14; 82-83, 90, 92, 108-109, 205-209). This agreement, in effect at the time material herein, [4] provided that none of the employer-members of the AGC and the Council would employ other than members of the Union (R. 13-14; 82-83, 108-109, 207). The practice under this agreement was for the Company to advise the Union of any need for laborers or hod carriers, and these men would then be dispatched from the Union's hall to the construction site, union members

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[3] The Company was incorporated in 1949, having functioned formerly as an individual enterprise (R. 48-49; 238-239). Until 1955, however, because of failure to request a change in registration, AGC continued to list the Company on its rolls as an individual enterprise (R. 49-50, 58, n. 2; 230-231, 240-241, 244).

[4] The agreement was of indefinite duration subject to modification by the parties upon appropriate notice at certain specified periods (R. 83-84, 206-207). It appears that, as a result of such notice, the agreement was to terminate on December 31, 1953, as to this Union (R. 83-85).

invariably being dispatched before others (R. 14, 16; 92-95, 99, 104-105).[5]

2. *The discrimination against Richard B. Kieburtz*

a. Events leading to Kieburtz' employment by Company

In June 1953, the Company began work on the construction of several school buildings on Mercer Island, Washington (R. 14; 106, 113-115, 240). In July 1953, Richard B. Kieburtz, a 19-year old student at the University of Washington, sought temporary summer employment as a construction laborer (R. 14; 139-140, 142-145, 174). Learning that his opportunity to find such work would be greater if he were a member of the Union, Kieburtz went to the Union's office and spoke to Robert Buchanan, a business agent for the Union (R. 14; 91, 96, 142-146). Buchanan told Kieburtz that if he found a job the employer was to call the Union for a temporary work permit (R. 14; 97-99, 145-147).[6]

Meanwhile, Kieburtz applied for work to Everett Sayler, the Company's job superintendent on the school construction job (R. 14; 106, 113, 115-116, 139-141). Sayler asked Kieburtz whether he was a member of the Union, and Kieburtz replied that he was not (R. 16; 118, 140, 149). Sayler suggested that Kieburtz leave his name at the Company's office and Kieburtz did so

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[5] The Union's business agent and secretary, Robert Buchanan, admitted that in dispatching men to jobs preference is given to the Union's members when the employment situation is not good (R. 94).

[6] Buchanan testified that it was the Union's practice upon application of an employer to give students permits, enabling them to work during vacations; and that such an employee was required to pay a $5 permit fee if employed on a job for more than 10 days (R. 16; 99-101, 103-105).

(R. 14, 18; 116, 117-118, 140, 142). On July 28, 1953, Kieburtz was informed by telephone that the Company had a job for him to begin the next morning (R. 14; 139, 147-148).

b. Kieburtz' employment and discharge by Company

On July 29, 1953, a Wednesday, Kieburtz reported to Sayler for work (R. 14; 119, 139, 148). Sayler assigned Kieburtz to Foreman Chester Tucker, and stated to Kieburtz, "We'll have to see how this union business works out later" (R. 14; 106, 120, 140, 148-149, 162-163). Kieburtz was put to work with another laborer, Sam Swatack, under Foreman Tucker's supervision (R. 14; 149-150).

On Friday, July 31, at about 10:30 in the morning, Kieburtz saw Elmer Wood, another of the Union's business agents, in conversation with Superintendent Sayler, and noticed one of them pointing in his direction (R. 15; 91, 155-158). Wood then spoke to Foreman Tucker, and came over to Kieburtz (R. 15; 158). Wood asked Kieburtz if he had a "card or anything" (R. 15; 158, 165-166). Kieburtz answered that he had no card but that he would like to join the Union (R. 15; 158, 166). Wood replied that Kieburtz could not become a Union member (R. 15; 158, 166). At this point, Foreman Tucker came over and stated that Kieburtz would be permitted to work out the day (R. 15; 158, 166).[7] Continuing his conversation with Wood, Kieburtz remarked that he thought he was entitled to join the Union as long as he had a job and Wood answered that there were too many members unemployed and

[7] Tucker testified that he heard Wood tell Kieburtz to get himself straightened out with the Union (R. 17; 184-185).

that new members would not be taken in (R. 15; 158, 166).

Kieburtz was discharged at the close of the workday. Foreman Tucker gave him two checks covering his three days of employment with the Company and said, "Sorry, but that is the way it is" (R. 15, 159-160, 163). Kieburtz then went to Superintendent Sayler who stated, "I don't know just what to tell you, kid. We have to go along with the Union on this or they could make trouble for us" (R. 15; 160). Sayler stated further that the Company had an agreement with the Union to hire through the Union's hall and that it had to go along with the Union on that (R. 15; 160). When Kieburtz protested that he thought the Taft-Hartley Act made such an arrangement unlawful, Sayler replied that the contract with the Union must be honored (R. 15; 160-161).

3. *The Board's conclusions as to respondents' unfair labor practices*

Upon the foregoing facts the Trial Examiner found that AGC, the Council, and the Company, by maintaining in effect a contract provision unlawfully preferring Union members for hiring and retention in employment violated Section 8 (a) (1) and (3) of the Act, and that the Union by like conduct on its part violated Section 8 (b) (1) (A) and (2) of the Act (R. 19-20). The Trial Examiner found further that the discharge of Kieburtz stemmed from the illegal contract provision requiring Union membership or approval for hire or retention of employment (R. 20-23).[8] Accordingly, the

[8] The Trial Examiner rejected as unsupported by the record the Company's claim that Kieburtz was discharged for poor work performance (R. 18-19; 120-126, 141, 149-160, 164-165, 180-183, 187-190).

Trial Examiner concluded that in this respect also the several respondents had violated Section 8 (a) (1) and (3) and Section 8 (b) (1) (A) and (2) of the Act respectively (R. 23).

Neither the Company nor the Union filed exceptions to the Trial Examiner's findings and recommended order. AGC and the Council, however, jointly filed exceptions defending the legality of the contract provision in issue and denying any liability on their part for the discharge of Kieburtz (R. 38-43). Following a supplemental hearing at which further commerce data was adduced (R. 45-50),[9] AGC filed further exceptions. The Board, upon due consideration of the whole record and the exceptions filed by AGC and the Council, adopted the Trial Examiner's findings, conclusions and recommendations with certain minor additions not material here (R. 54-65).

II. The Board's Order

The Board's order (R. 58-65) directs the Company to cease and desist from conditioning hire or tenure of employment on prior clearance or approval by the Union, or any other labor organization, except as authorized by Section 8 (a) (3) of the Act; from giving effect to the illegal union-security provision of its 1950 contract with the Union or to like provisions of any later agreements; and from in any like manner violating the rights guaranteed its employees by Section 7. Cease and desist provisions to the same general effect were directed to AGC, the Council, and the Union, but ap-

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[9] The Board's order directing the holding of a supplemental hearing for the taking of additional commerce data inadvertently attributed to the Union the exceptions filed by AGC and the Council (R. 45, n. 1).

plication of the cease and desist provisions in these instances was limited to the situations where the operations of the employer involved are in or affect interstate commerce. Affirmatively, the several respondents are directed to make Kieburtz whole for earnings lost as a result of the discrimination against him and to post appropriate notices.

SUMMARY OF ARGUMENT

A. The Company and the Union, having filed no exceptions to the Trial Examiner's findings, conclusions, or recommended order, and the Board having adopted such findings, conclusions, and order, the Company and the Union are now precluded by Section 10(e) of the Act from objecting thereto before this Court.

B. The Board properly asserted jurisdiction over AGC and the Council. The AGC and the Council bargain collectively in behalf of their employer-members who are engaged in construction work directly affecting interstate commerce. Under such circumstances the Board, with court approval, has uniformly regarded such entities as employers for jurisdictional purposes. The rationale for this holding is that where employers bargain as a group with the respresentative of their respective employees, any labor dispute that might arise will inevitably tend to disrupt the operations of all the participating employers and thereby create a burden on the free flow of commerce. This is particularly true in the instant case where the unfair labor practices stem directly from the implementation of the contract which AGC and the Council negotiated and maintained in effect in behalf of their employer members.

C. The union-security provision of the contract here in issue and the practice thereunder transgressed the

permissible limits of union-security agreements under the Section 8(a)(3) proviso in that it granted an illegal preference to Union members in hire and tenure of employment. Enforcement of such a provision is itself a violation of Section 8(a)(1) and (3) of the Act quite apart from execution of such an agreement. A clause in the contract providing for suspension of any provision in the contract in the event that it should be "held" unlawful did not suspend the offending provision absent such a holding, and its coercive impact upon employees remained unimpaired. Nor can AGC and the Council escape liability for this unlawful union-security agreement on the ground that it merely continued an agreement in effect prior to the enactment of the Taft-Hartley Act. The exemption of Section 102 thus sought to be invoked is expressly conditioned on the non-renewal or non-extension of the agreement following the enactment of the Act and the agreement here in issue was admittedly negotiated and executed in 1950.

The claim that AGC and the Council are immune under the six-month limitation proviso of Section 10(b) of the Act because the offending provision was executed three years before the events complained of misconceives the nature of the unfair labor practice found which was, not the execution, but the continued enforcement of the illegal union security arrangement. The closely related contention that AGC and the Council are not themselves employers and cannot be held liable for the implementation of the contract by their employer members is refuted by the fact that AGC and the Council, as agents of their employer members, fall within the statutory definition of "employer" and by the further fact that on the record AGC and the Council are shown to have maintained in effect the unlawful

arrangement by which, as collective bargaining representative, they bound their employer-members. The final defense of AGC and the Council that at the time relevant here the Company was listed in their membership rolls as an individual enterprise and not as a corporation is a technical argument which fails to conceal the actual and working relationship of the Company as an employer-member of AGC and the Council and the latter's continuing representation of the Company.

D. The Board's action in reopening the proceeding for the limited purpose of adducing further commerce data it deemed necessary or appropriate for final disposition of the case conforms to accepted judicial procedure. Such procedure does not import a requirement that issues already fully litigated be subjected to relitigation merely because a different Trial Examiner sat in the reopened phase of the proceeding. Moreover, the fact that the Board subsequently had the entire record before it for the purpose of making its own determination vitiates any due process contention predicated on the fact that different Trial Examiners had earlier participated in separate phases of the case.

ARGUMENT

Statement of the Issues

Since the Company and the Union took no exception to the Trial Examiners' findings, conclusions, or recommended order, which were adopted by the Board, they are precluded by Section 10(e) of the Act from raising any objection thereto before this Court. *N.L.R.B.* v. *Cheney California Lumber Co.*, 327 U. S. 385, 387-389; *N.L.R.B.* v. *Noroian*, 193 F. 2d 172, 173 (C.A. 9); *N.L.R.B.* v. *Puerto Rico Steamship Ass'n*, 211 F. 2d 274, 276 (C.A. 1). And see *F.P.C.* v. *Colorado*

Interstate Gas Co., 348 U.S. 492. In any event, substantial evidence, summarized above, pp. 6-7, supports the Board's findings that the Company violated Section 8(a)(1) and (3) of the Act by giving effect to the illegal union-security provision in its contract with the Union and by discharging Kieburtz pursuant thereto, and that the Union violated Section 8(b)(1)(A) and (2) of the Act by giving effect to that same provision and thereby causing the Company to discharge Kieburtz in violation of Section 8(a)(3) of the Act.

There remains for consideration only the validity of the findings and order against AGC and the Council who, unlike the Company and the Union, filed exceptions before the Board.

I. The Board Properly Asserted Jurisdiction Over AGC and the Council

It is undisputed that AGC and the Council engage in collective bargaining and sign association-wide agreements with labor organizations in behalf of their employer-members. Indeed, the contract of November 3, 1950, here involved, is just such an agreement. Equally undisputed is the fact that the employer-members of AGC and the Council perform construction work outside the State of Washington in excess of $10,000,000 a year in value, and that during 1953, the year here material, they engaged in a substantial amount of construction work directly involved in the national defense effort (*supra,* p. 3). That such a substantial flow of services across state lines and in the national defense effort affects commerce within the meaning of Sections 2(6) and (7) and 10(a) of the Act cannot be gainsaid. *I.B.E.W., Local 501* v. *N.L.R.B.,* 341 U. S. 694, 699; *N.L.R.B.* v. *Thomas Rigging Co.,* 211 F. 2d 153, 155-156 (C.A. 9), certiorari denied, 348 U. S. 871.

AGC and the Council contend, however, that the Board improperly asserted jurisdiction over them since their own operations, apart from those of their employer-members whose operations affect interstate commerce, do not affect interstate commerce. We submit that the contention is without merit.

The Board predicated its exercise of jurisdiction here on the fact that through the medium of AGC and the Council their members participated in an association-wide bargaining group of employers whose total volume of operations substantially affects commerce. The Board's rationale for such assertion of jurisdiction was enunciated in *Carpenter and Skaer, Inc.*, 90 NLRB 417, at 419, as follows:

> Consistent with our well established policy in representation cases we find that in passing upon the jurisdictional issue herein, the Association and its members must be regarded as a single enterprise. That the totality of the operations, in volume and character, of all members of the Association has a substantial effect on interstate commerce is apparent. The fact that we might not assert jurisdiction as to each member of [sic] before the Board individually or that this proceeding does not directly involve all its members is not here material, because the alleged unfair labor practices are attributed to the Association itself and are the result of the application of a common labor policy by the Association on behalf of its members including those involved herein.[10]

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[10] See also *Vaughn Bowen*, 93 NLRB 1147, 1149-1150, cited with approval in *N.L.R.B.* v. *Gottfried Baking Co., Inc.*, 210 F. 2d 772, 778 (C.A. 2); *South Texas Chapter, Associated General Contractors of America, Inc.*, 110 NLRB 638, 639.

Where, as here, employers bargain as a group with the representative of their respective employees, any labor dispute that might arise would have the inevitable tendency to disrupt the operations of all the participating employers and bring about a serious interruption to the free flow of interstate commerce. Accordingly, the Board's exercise of jurisdiction over individual employers who are members of an association which bargains for a common labor contract has been sustained on the basis of the totality of operations of all the employer-members of such an association. *Leonard* v. *N.L.R.B.*, 197 F. 2d 435, 436 n. 1 (C.A. 9); *N.L.R.B.* v. *Gottfried Baking Co., Inc.*, 210 F. 2d 772, 778 (C.A. 2); cf. *Katz* v. *N.L.R.B.*, 196 F. 2d 411, 413 (C.A. 9). Identical considerations support the Board's jurisdiction over the association itself, particularly where, as here, the implementation of the contract negotiated by the association in behalf of its members forms the basis of the unfair labor practices. See *N.L.R.B.* v. *Waterfront Employers of Washington*, 211 F. 2d 946 (C.A. 9); *N.L.R.B.* v. *Sun Tent-Luebbert Co.*, 151 F. 2d 483, 485-486 (C.A. 9), certiorari denied, 329 U. S. 714; *Red Star Express Lines* v. *N.L.R.B.*, 196 F. 2d 78, 80 (C.A. 2); *N.L.R.B.* v. *George D. Auchter Co.*, 209 F. 2d 273 (C.A. 5). Cf. *N.L.R.B.* v. *ILWU, Local 10*, 214 F. 2d 778 (C.A. 9); *Joliet Contractors Ass'n.* v. *N.L.R.B.*, 193 F. 2d 833 (C.A. 7).[11]

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[11] Because of the absence of any exceptions by the Company, it is superfluous to emphasize that the evidence summarized above, pp. 3-4, as to the operations of the Company itself affords ample basis for the Board's assertion of jurisdiction over that enterprise.

II. The Board Properly Concluded that AGC and the Council Violated Section 8 (a) (1) and (3) of the Act

As shown above, p. 4, the contract of November 3, 1950, in effect in 1953, the time material here, required all employer-members of AGC and the Council to employ members of the Union only.[12] The practice under this agreement was for the Company to advise the Union of its need for employees, and such men would then be dispatched from the Union hall to the construction site, Union members invariably being dispatched before others (*supra,* pp. 4-5). It is settled law that union security agreements or arrangements granting preference in employment to union members beyond the limited conditions permitted by Section 8 (a) (3) of the Act are illegal. *N.L.R.B.* v. *Daboll,* 216 F. 2d 143, 145 (C.A. 9), certiorari denied, 348 U. S. 917; *N.L.R.B.* v. *Swinerton,* 202 F. 2d 511, 514-516 (C.A. 9), certiorari denied, 346 U. S. 814. Equally well settled is the principle that the enforcement of such an agreement quite apart from its execution constitutes a violation of the Act. *N.L.R.B.* v. *Daboll, supra; Katz* v. *N.L.R.B.,* 196 F. 2d 411, 415 (C.A. 9). Applying these settled principles to the instant case it follows, we submit, that AGC and the Council, by maintaining in effect the illegal union-security arrangement with the Union which they had negotiated in behalf of their employer-members and out of which, *inter alia,* the discharge of Kieburtz stemmed, violated Section 8 (a) (1) and (3) of the Act.

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[12] No provision was made for a 30-day grace period for employees to acquire union membership, a minimal requirement for a valid union-security agreement under the proviso to Section 8 (a) (3) of the Act.

AGC and the Council do not challenge the controlling principles here applied. They do, however, seek to absolve themselves of liability on several grounds: (1) that the union-security provision of the 1950 contract, in effect here, was not illegal inasmuch as that contract contained a savings provision making it inapplicable to employers engaged in operations affecting interstate commerce; (2) that the union-security provision of the 1950 contract was merely a continuation of a similar provision in effect prior to the enactment of the Taft-Hartley Act, and hence was immunized by Section 102 of the Act; (3) that, in any event, their sole offense was the negotiation and execution of the offending provision, liability for which was barred by the six-month limitations provision of Section 10 (b); (4) that inasmuch as they played no direct role in the administration or effectuation of the offending provision, neither the discharge of Kieburtz nor any other unfair labor practice arising from the operation of that provision by the employer-members could be attributed to them; and (5) that they could not be held liable for the conduct of the Company because the Company was never a member of AGC or Council at any time here relevant in its corporate capacity. We submit that none of these defenses has merit.

The savings provision.—Section 11 of the contract here in issue provides that (R. 208-209):

> If any section, subsection, clause, sentence or phrase of this agreement is, for any reason, held to be repugnant to, or in conflict with or in violation of the Labor Management Relations Act of 1947 . . . such repugnancy, conflict of violation shall not affect the validity of the remaining portions of this agreement . . .

AGC and the Council argue that the effect of this language is to limit the union-security provision only to those of its members engaged in intrastate commerce and to preclude its application to operations like those of the Company affecting interstate commerce. But, as the Board found (R. 19-20), the plain language of Section 11 affords no such distinction. It provides merely that if the union-security provision or any other provision of the contract should be "held" illegal, the remaining portions of the contract shall remain in effect. It does not, absent such a holding, suspend or defer the operation of the offending provision. The gravamen of the offense here is that "the existence of such an agreement without more tends to encourage membership in a labor organization." *Red Star Express Lines* v. *N.L.R.B.*, 196 F. 2d 78, 81 (C.A. 2). As stated in *N.L.R.B.* v. *Gaynor News Co., Inc.*, 197 F. 2d 719, 723-724 (C.A. 2), affirmed, 347 U. S. 17,

> . . . an employee cannot be expected to predict the validity or invalidity of particular clauses in the contract and will feel compelled to join the union where a union-security clause of questionable validity exists, if only as a hedging device against a possible future holding of the clause. Only a specific provision deferring application of the union-security clause will immunize the contract against this illegality.

Accord: *N.L.R.B.* v. *Knickerbocker Plastic Co., Inc.*, 218 F. 2d 917, 923-924 (C.A. 9). No such specific provision is present here. [13]

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[13] As already noted, pp. 8-9, the Board's order against AGC and the Council, like its order against the Union, enjoining unlawful union-security arrangements is carefully framed to apply only to employers whose operations affect interstate commerce. Compare *N.L.R.B.* v. *Sterling Furniture Co.*, 202 F. 2d 41 (C.A. 9).

The Section 102 argument.—Section 102 of the Act, so far as relevant here, precludes application of Section 8 (a) (3) and 8 (b) (2) sanctions for the performance of any obligation under a collective bargaining agreement entered into prior to the enactment of the Taft-Hartley Act where such performance would not have constituted an unfair labor practice theretofore, "unless such agreement was renewed or extended subsequent thereto." In view of the undisputed fact that the current contract here in issue was executed as an independent agreement on November 3, 1950, three years after the enactment of the Taft-Hartley Act, the claim of AGC and the Council to immunity under Section 102 because of the existence of similar union-security provisions in agreements prior to 1947 requires no further refutation. See *N.L.R.B.* v. *Daboll,* 216 F. 2d 143, 145 (C.A. 9), certiorari denied, 348 U. S. 917.

The Section 10 (b) argument.—Under the terms of Section 10 (b) of the Act no complaint can issue upon an unfair labor practice occurring more than six months before the filing and service of a charge. AGC and the Council urge that since their only action consisted of the negotiation and signing of the contract containing the offending provision and since that action occurred nearly three years prior to the filing of the charges herein, Section 10 (b) precluded the Board from proceeding against them. In making this defense, however, AGC and the Council misconstrue the nature of the violation found and their responsibility therefor. As already shown (p. 4, n. 4), and as demonstrated more fully later, AGC and the Council continued to give effect to the contract in 1953 and their employer-members necessarily did likewise. This continued enforcement of the contract within the limitations period

formed the basis for the Board's finding here. See *Katz* v. *N.L.R.B., supra,* 211 F. 2d, at 415.

The non-participation argument.—Closely related to the foregoing contention is the claim of AGC and the Council that they merely negotiated the contract here in issue as agent for their employer-members, that they were not themselves employers, and that they participated in no way and could not be held responsible for the application of the contract provisions, a function which devolved exclusively upon the several employer-members. But AGC and the Council overlook the fact that in acting as agent for their employer-members in collective bargaining and in fixing terms and conditions of employment for the employees of its members they are themselves employers within the literal language of Section 2 (2) of the Act and responsible for the foreseeable consequences of the conditions they created. *Radio Officers* v. *N.L.R.B.,* 347 U. S. 17, 45.

Moreover, the crux of the matter is that AGC and the Council on behalf of their employer-members entered into a contract containing an illegal union-security arrangement, and that they made no attempt to remedy that situation but on the contrary continued it in effect. Under the contract, the initiative in cancelling or amending the agreement falls upon AGC and the Council, not upon the employer-members (R. 206-207). Indeed, Colton D. Harper, Assistant Manager of AGC, testified that AGC and the Council continued to give effect to the contract in 1953 (R. 82-84), and Eugene F. Shuck, Jr., vice-president and secretary of the Company, testified that the AGC contract controlled its relations with the Union and was in effect in 1953 (R. 105, 108-109). Under these circumstances AGC and

the Council may not evade continuing responsibility for the situation they created and maintained in effect. This Court in *Waterfront Employers of Washington* v. *N.L.R.B.,* 211 F. 2d 946, 951, 953-954, rejected a contention virtually on all fours with the instant claim.

By the same token, AGC and the Council may not evade liability for the discharge of Kieburtz on the ground that they did not participate directly in the mechanics of that discharge. The Board adopted the Trial Examiner's finding, not excepted to by either the Company or the Union, the parties directly involved, that the discharge stemmed from the illegal union-security provision (*supra,* p. 7). Everett Sayler, job superintendent of the Company, explained to Kieburtz in discussing his discharge that the contract with the Union had to be honored (*supra,* p. 7). In this frame of reference, as the Board found (R. 58), AGC and the Council "discriminated in regard to the hire and tenure of employment of Kieburtz to the same extent as Shuck" and are correspondingly liable. See *Waterfront Employers of Washington, supra.*

The nonmembership of the Company.—The final defense of AGC and the Council on this phase of the case is that E. F. Shuck Construction Co., Inc., the Company found to have engaged in unfair labor practices, was a corporation and that no such corporation was listed in the AGC roster of members until after the events complained of. The contention is hypertechnical. The record establishes (see p. 4, n. 3, *supra*) that Shuck, Sr., conducted a construction business in his own name prior to 1949 and was a member of AGC, that the incorporation of the Company in 1949 made no difference in the business entity so far

as relevant here, and that the continued listing, membership, and representation of the Company in AGC as an individual enterprise rather than in its corporate name was due merely to the fortuitous circumstance that a request in writing for such a change of listing was not made until after the events here complained of. The technical niceties of corporate relationships, however valid for other purposes, may not be used to defeat the purposes of the Act. See *N.L.R.B.* v. *Stowe Spinning Company,* 336 U.S. 226; *N.L.R.B.* v. *Condenser Corp.,* 128 F. 2d 67, 71 (C.A. 3).

III. The Board's Action in Reopening the Proceeding for the Limited Purpose of Adducing Further Commerce Data Was Valid and Proper

As already noted, p. 8, the Board on February 9, 1955, following the issuance of the Trial Examiner's Intermediate Report, directed that the record be reopened for the limited purpose of adducing further commerce data (R. 43-45). For reasons not appearing, a different Trial Examiner sat on this phase of the case (R. 46). AGC and the Council contend that the Board violated procedural due process by limiting the reopened proceeding and by denying respondents an opportunity to relitigate all the issues.

The short of the matter is that the parties had full opportunity to litigate all the issues at the initial hearing. The second hearing was directed merely because, following the issuance of the original Intermediate Report, the Board had revised the standards governing its assertion of jurisdiction and accordingly deemed it appropriate to supplement the commerce data in the record to determine whether jurisdiction should be asserted under the revised standards (R. 44). See

Jacobsen v. *N.L.R.B.,* 120 F. 2d 96, 98-101 (C.A. 3). In so doing, the Board was not required to permit respondents to relitigate all the issues.

It is accepted judicial practice to confine a remand to the specific purpose for which it is deemed necessary. See, e.g., *N.L.R.B.* v. *Retail Clerks Union Local 648,* 186 F. 2d 371, 372 (C.A. 9); *N.L.R.B.* v. *Cambria Clay Products Co,* 215 F. 2d 48, 56 (C.A. 6); *N.L.R.B.* v. *Dallas City Packing Co.,* 230 F. 2d 708 (C.A. 5). Moreover, while the function of the new Trial Examiner was limited to the purpose of the remand, the Board itself had the entire record before it for its consideration. See *Willapoint Oysters, Inc.* v. *Ewing,* 174 F. 2d 676, 696 (C.A. 9), certiorari denied, 338 U. S. 860; *N.L.R.B.* v. *Stocker Mfg. Co.,* 185 F. 2d 451, 452-454 (C.A. 3), and cases cited therein. Thus, respondents were in no way prejudiced by the narrow scope of the remand. "[D]ue process deals with substance, not with form." *N.L.R.B.* v. *Townsend,* 185 F. 2d 378, 382 (C.A. 9), certiorari denied, 340 U. S. 811; *Fay* v. *Douds,* 172 F. 2d 720, 725 (C.A. 2).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full. [14]

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JULY, 1956.

[14] The objection of AGC and the Council to the requirement of the order that they post notices at the Company's job sites on the ground that they have no authority to go on those job sites seems neither valid nor realistic in view of the relationship between AGC, the Council, and their members, and in view of the fact that the Company is likewise subject to the Board order. Moreover, the order here, not unlike that enforced by this Court in *N.L.R.B.* v. *Waterfront Employers of Washington,* 211 F. 2d 946, 952 (C.A. 9), is precisely "adapted to the situation which calls for redress" (*N.L.R.B.* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 348. In *N.L.R.B.* v. *Gluek Brewing Co.,* 144 F. 2d 847, 857, the Eighth Circuit rejected an analogous contention and suggested that the parties there involved could "work out the intent of the order." In any event, the question of the feasibility of compliance can be determined later after AGC and the Council have made a sincere effort to comply. See *N.L.R.B.* v. *Caroline Mills, Inc.,* 167 F. 2d 212, 214 (C.A. 5).

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Sec. 151, *et seq.*), are as follows:

DEFINITIONS

Sec. 2. When used in this Act—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, ...

* * * * *

(6) The term "commerce" means, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day

following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; . . .

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membershp;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. . . .

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, . . .

(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: . . .

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact

if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

* * * * *

Sec. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

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